Hashim bin Endot v Pacific & Orient Insurance Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUMMONS NO D2-22-440 OF 1994
ABDUL MALEK AHMAD J
6 OCTOBER 1995

Civil Procedure *— Summary judgment — Appeal — Whether triable issues raised — Defendant were insurers for registered car owner involved in accident — Car purportedly sold to the driver of the car who had his own insurance — Defendant consented to judgment being entered against parties claimed against — Whether knowledge of other insurer gave rise to a triable issue*

The plaintiff was involved in an accident on 29 March 1985 as a passenger in a vehicle which had been collided into by a motor vehicle owned by Ng Chun Wee and driven by Hew Ah Wah. The vehicle was insured by the defendant from 8 January 1985 to 7 January 1986. The vehicle was apparently sold to Hew Ah Wah who took up insurance cover from another insurance company from 28 March 1985 to 27 March 1986. The plaintiff instituted legal proceedings against the registered owner and the driver on 27 May 1986 and issued the requisite notice under s 80(2) of the Road Traffic Ordinance 1958 to the defendant. The defendant indicated to the other insurer that if it was established that both they and the other insurer were found to be co-insurers in the suit, they were prepared to meet half of the damages and costs although their cover note had been cancelled prior to the accident. The defendant agreed to a consent judgment being entered in the related suit and the defendant's solicitors requested the plaintiff's solicitors to proceed with the present suit to enable the defendant to seek contribution from the other insurer. The plaintiff's application for summary judgment in the present suit that was based on the consent judgment in the related suit was granted by the senior assistant registrar and the appeal to the judge was dismissed. The defendant applied for stay pending appeal and further appealed to the judge against the order for summary judgment. The issue for consideration was whether the existence of the other insurer was a triable issue and whether it was appropriate to grant summary judgment in favour of the plaintiff.

Held, dismissing the appeal with costs:

(1) The plaintiff's search at the Road Transport Department had only stated that the defendant was the insurer and it was for the defendant, before consenting to judgment, to bring the other insurer as a co-defendant or as the third party in this suit. There was no reason why the wrong and improper conduct of the defendant should affect the plaintiff who was definitely entitled to a judgment debt obtained by consent (see p 383H).

(2) The summary judgment in favour of the plaintiff was correct as the defendant could not retract from the consent order they had

agreed to despite knowing that the motor vehicle was being driven by a person who had a separate insurance cover with another insurer. The defendant was however at liberty to file a separate suit against the other insurer for their partial or full contribution (see p 383E–F).

(3) The stay of execution was refused as no special circumstances had been raised and there was no reason why the plaintiff, now blinded in both eyes because of the accident, should be deprived of his money which the defendant had agreed to pay as long ago as 5 October 1993 (see pp 383I–384A).

[Bahasa Malaysia summary

Plaintif terlibat di dalam suatu kemalangan pada 29 Mac 1985 sebagai seorang penumpang di dalam kenderaan yang telah dilanggar oleh sebuah kenderaan bermotor yang dimiliki oleh Ng Chun Wee dan dipandu oleh Hew Ah Wah. Kenderaan tersebut diinsuranskan oleh defendan dari 8 Januari 1985 sehingga 7 Januari 1986. Kenderaan tersebut kemudiannya dijual kepada Hew Ah Wah yang mengambil perlindungan insurans daripada syarikat insurans yang lain dari 28 Mac 1985 sehingga 27 Mac 1986. Plaintif telah memulakan prosiding undang-undang terhadap tuan punya berdaftar dan pemandu pada 27 Mei 1986 dan mengeluarkan notis yang diperlukan di bawah s 80(2) Ordinan Trafik Jalan 1958 kepada defendan. Defendan memberikan petunjuk kepada penginsurans yang lain bahawa jika dibuktikan bahawa mereka dan penginsurans yang lain didapati sebagai penginsurans bersama di dalam guaman tersebut, mereka bersedia untuk memenuhi separuh daripada ganti rugi dan kos walaupun nota perlindungan telah dibatalkan sebelum kemalangan tersebut. Defendan telah bersetuju kepada penghakiman persetujuan tersebut dimasuki di dalam guaman yang berkaitan dan peguam defendan meminta peguam plaintif untuk memulakan guaman ini untuk membolehkan defendan mendapatkan sumbangan daripada penginsurans-penginsurans yang lain. Permohonan plaintif untuk penghakiman terus di dalam kes ini yang berdasarkan penghakiman persetujuan di dalam guaman yang berkaitan telah diberikan oleh penolong kanan pendaftar dan rayuan kepada hakim telah ditolak. Defendan telah memohon untuk penggantungan sehingga rayuan didengar dan merayu selanjutnya kepada hakim terhadap perintah untuk penghakiman terus. Isu untuk pertimbangan adalah sama ada kewujudan penginsurans yang lain adalah suatu isu yang boleh dibicarakan dan sama ada ia adalah sesuai untuk memberikan penghakiman terus yang berpihak kepada plaintif.

Diputuskan, menolak rayuan dengan kos:

(1) Carian plaintif di Jabatan Pengangkutan hanya menyatakan bahawa defendan adalah penginsurans dan ia adalah untuk

defendan, sebelum bersetuju dengan penghakiman, untuk menyertakan penginsurans yang lain sebagai defendan bersama atau sebagai pihak ketiga di dalam tindakan ini. Tiada sebab mengapa kelakuan defendan yang salah dan tidak wajar patut menjejaskan plaintif yang sudah tentu berhak kepada penghakiman terhutang yang diperolehi secara persetujuan (lihat ms 383H).

(2) Penghakiman terus yang berpihak kepada plaintif adalah betul oleh kerana defendan tidak boleh berpatah balik daripada perintah persetujuan yang mereka telah bersetuju walaupun tahu bahawa kenderaan motor telah dipandu oleh seseorang yang mempunyai perlindungan insurans yang berasingan yang diambil daripada penginsurans yang lain. Namun begitu, defendan adalah bebas untuk memfailkan tindakan yang berasingan terhadap penginsurans yang lain untuk sumbangan sebahagian atau sepenuhnya (lihat ms 383E–F).

(3) Pengantungan pelaksanaan telah ditolak oleh kerana tiada keadaan-keadaan khas telah dibangkitkan dan tiada sebab mengapa plaintif, yang kini sudah menjadi buta di kedua-dua belah mata oleh kerana kemalangan tersebut, patut kehilangan hak kepada wangnya yang defendan telah bersetuju untuk membayar sejak 5 Oktober 1993 lagi (lihat ms 383I–384A).]

Notes

For cases on appeal against summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4410–4431.

Cases referred to

Bankers & Traders Insurance Co Ltd v National Insurance Co Ltd [1985] 1 MLJ 401 (refd)

Hong Leong Finance Bhd v Hon Hoi Weng & Ors [1987] 2 MLJ 377 (refd)

Legislation referred to

Road Transport Act 1987 s 96(2)

Road Traffic Ordinance 1958 s 80(2)

Mabel Sabastian (*Sabastian & Nayar*) for the plaintiff.

RK Nathan (*RK Nathan & Co*) for the defendant.

Abdul Malek Ahmad J: Although the decision was made on 6 October 1995, leave to appeal was only obtained from the Court of Appeal on 8 April 1996 and the notice of appeal had only been filed on 11 April 1996. There was of course the usual difficulty in getting the relevant file which had resulted in this unfortunate delay.

A For this purpose, it may be wise for the Rules Committee to reconsider reverting to the previous procedure of obtaining leave to appeal from the court that made the decision, and not to the court the aggrieved party is appealing to, to avoid this sort of situation. Once leave is granted, the trial judge who gave the leave would instantly be aware of the pending appeal instead of being blissfully ignorant of the number of appeals accumulating against his decision.

Learned counsel for the defendant had filed a notice of appeal, upon a certificate of urgency, on 26 June 1995 against the decision of the learned senior assistant registrar on 24 June 1995 dismissing their application for a stay of all proceedings until their earlier appeal against the order for summary judgment was disposed of, costs and other relief. That earlier appeal had been filed on 13 June 1995 against the order made by the learned senior assistant registrar in favour of the plaintiff on 10 June 1995.

On 10 July 1995, I had heard the arguments on the stay and had adjourned my decision to the 11 August 1995. The O 14 appeal which had been earlier fixed for 2 August 1995 was therefore postponed to the same date. The 11 August 1995 date was subsequently changed to 8 September 1995 when I had allowed the application for stay until the O 14 appeal was heard following the decision in *Hong Leong Finance Bhd v Hon Hoi Weng & Ors* [1987] 2 MLJ 377 where the court made a distinction, in respect of applications for stay pending appeal, between a matter that was decided upon full trial and enquiry and one summarily arrived at by a senior assistant registrar.

As for the O 14 appeal, I had decided on 6 October 1995 to dismiss it with costs and the present appeal is only as regards this decision. I had also subsequently disallowed, on 27 October 1995, the defendant's application for stay pending appeal, which was filed on 12 October 1995.

I shall now deal with the plaintiff's O 14 application filed on 25 August 1994. The affidavit in support by the plaintiff's solicitor filed on the same date and the plaintiff's statement of claim had stated that the plaintiff's claim was based on a consent judgment given in Kuala Lumpur High Court Civil Suit No S2–P25–455–1986 ('the related suit') on 5 October 1993 for RM132,000 for general and special damages together with costs of RM13,000 and interest on the said sum at 8% per annum from 5 October 1993 to the date of full satisfaction. The relevant accident had taken place on 29 March 1985 at about 1.30am while the plaintiff was a passenger in motor vehicle No BCC1943 which had been collided into at the junction of Jalan Port Klang and Klang Highway by motor vehicle No BCB6659 owned by Ng Chun Wee and driven by Hew Ah Wah, who were the defendants in the related suit, and insured by the defendant here.

The plaintiff had given notice to the defendant under s 80(2) of the Road Traffic Ordinance 1958 (now s 96(2) of the Road Transport Act 1987) on 11 April 1986 and legal proceedings had commenced on 27 May 1986 against the registered owner and the driver in the related suit.

The order on 5 October 1993, which was by consent, clearly states that RM132,000 is for general and special damages for the plaintiff, RM13,000

is for costs for the plaintiff's solicitors and RM3,000 for the third party's solicitors upon the withdrawal of the claim against Mohd Esa bin Md Majid the third party. The plaintiff had also exhibited in his application the search report from the Road Transport Department in Selangor dated 8 June 1985, stating that Ng Chung Wee (the second name appears to have been misspelt in this particular letter) was the owner of motor vehicle No BCB6659 and the defendant was the insurer, and also their notice on 11 April 1986 to the insurer under s 80(2) of the Road Traffic Ordinance 1958.

Now, what was the defendant's answer to all these? By their affidavit filed on 21 September 1994, their claims manager had averred that although Ng Chun Wee was the registered owner of motor vehicle No BCB6659 which was insured with them from 8 January 1985 to 7 January 1986, Ng Chun Wee had sold the said vehicle to Hew Ah Wah who was driving it on the date of the accident namely, 29 March 1985. Hew Ah Wah had taken out insurance cover for British American Life and General Insurance Bhd ('the other insurer') from 28 March 1985 to 27 March 1986.

The defendant had instructed their solicitors by letter dated 28 September 1993 that if it was established that both they and the other insurer were found to be co-insurers in the recovery suit, they were prepared to meet half of the damages and costs although their cover note had been cancelled prior to the accident. Since the date of hearing had been fixed on 5 October 1993 and since there was no communication from the other insurer, the defendant had faxed them a letter on 4 October 1993 stating that the defendant was going to record a consent settlement for RM148,000 on the next day with the plaintiff but stressed that as it was their view that the other insurer were actually the insurer at the material time, they would raise the same point when the plaintiff filed the recovery summons.

The other insurer had replied by letter dated 14 October 1993 that despite not getting the replies to their queries, they were agreeable to bear 50% of the settlement sum. The defendant's solicitors had written to the other insurer on 4 November 1993 stating that their stand was that if the defendant and the other insurer were held to be co-insurers, the judgment sum would be equally divided but if the defendant was held not to be the insurer, the other insurer would have to meet the full judgment sum.

By letter dated 8 March 1994, the defendant's solicitors had written to the plaintiff's solicitors requesting them to proceed with the recovery summons to enable the defendant to seek contribution from the other insurer.

The only issue here is whether the defendant's knowledge of the existence of the other insurer means a triable issue had been raised in the O 14 proceedings between the plaintiff and the defendant and whether it was appropriate to grant summary judgment in favour of the plaintiff in these circumstances.

In their affidavit in reply, the defendant had exhibited the police report by Hew Ah Wah as regards the accident. It states that he was the driver of

A the relevant motor vehicle at the time of the accident. It does not state that he was the owner or who the insurer of the vehicle were. Except for the letter dated 8 March 1994, which was five months after the consent order, from the defendant's solicitors to the plaintiff's solicitors requesting them to file the recovery summons so that the defendant can seek contribution from the other insurer, all the other letters attached to the defendant's affidavit in B reply to the plaintiff's O 14 application had not been copied to the plaintiff or his solicitors and the majority of the letters are after the consent order. Despite the defendant knowing of the other insurer at the eleventh hour before the hearing of the related suit, they had still chosen to record the consent judgment with the plaintiff planning to recover from the other C insurer later.

In these circumstances, it was my view that they would have to do just that, that is, recover from the other insurer in a separate suit. In *Bankers & Traders Insurance Co Ltd v National Insurance Co Ltd* [1985] 1 MLJ 401, the Privy Council had held that (at p 401 D–E):

D > It is plain from the terms of the owner's policy that the owner's insurers were not on risk when the car was being driven by another person who had a policy of his own which covered him. The driver's insurers were therefore on risk at the time of the accident and not the owner's insurers. The respondents, being the driver's insurers were liable to satisfy the third party judgment against their insured.

E However, the facts and sequence of events here are slightly different in that the owner's insurer namely the defendant had already consented to judgment being recorded against them despite knowing that the motor vehicle was being driven by a person who had a separate insurance cover with the other insurer. Based on that decision, however, the defendant is at F liberty to file a separate suit against the other insurer for their partial or full contribution.

It follows that the summary judgment in favour of the plaintiff here was definitely correct in this situation as the defendant cannot retract from the consent order they had agreed to. It would have been more prudent for them to have asked for a postponement, after they had known of the other G insurer, on the hearing date on 5 October 1993 instead of recording the consent judgment and now trying to stop it from being enforced. The correspondence they exhibited in their affidavit in reply was a private arrangement between them and the other insurer except the letter dated 8 March 1994 to the plaintiff's solicitors five months after the consent H order. The plaintiff's search at the Road Transport Department had only stated that the defendant was the insurer and it is for the defendant, before consenting to judgment, to bring the other insurer in this suit as a co-defendant or as the third party. I do not, therefore, see any reason why the wrong and improper conduct of the defendant should at this stage affect the plaintiff who is definitely entitled to a judgment debt obtained by consent.

I I had accordingly dismissed the defendant's appeal against the O 14 judgment with costs and had also refused to grant a stay of my order as I found no special circumstances had been raised. I also saw no reason why

the plaintiff, now blinded in both eyes because of the accident, should be deprived of his money which the defendant had agreed to pay as long ago as 5 October 1993.

Appeal dismissed with costs.

Reported by Chin En Tek